

## Symposium: Collective Management of Copyright: Solution or Sacrifice?

### The Practical Difficulties of Implementing Collective Management Schemes

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#### INTRODUCTION

Copyright Clearance Center (“CCC”) has been actively engaged in a variety of collective licensing models in the text publishing industry since it opened its doors on the effective date of the Copyright Act of 1976. The practical difficulties of collective licensing and collective management are legion; CCC has experience with many of them and has managed to avoid many others. This Paper is intended to address only a few in order to provide some context for today’s conference.

#### I. CREATION OF CCC

*The problem we are here to discuss is not really a new one. It has assumed rather critical importance in recent years . . . partly because we are in the “information age,” in which there has been a growth of information posing problems for users and producers of that information; and partly because of the inclusion of newer technologies . . . .*<sup>1</sup>

It seems clear that this statement is true today, in 2011. However, it was made in 1976 by the late Michael Harris, then Vice President at John Wiley & Sons, Inc., who went on to become one of CCC’s first board members. So, the challenges CCC has faced were not new in 1976, and they are not new today.

In the 1970s, holders of copyright rights in text-based works were concerned

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1. Michael Harris, *The Case for a Clearinghouse*, in *ESSENTIAL ELEMENTS OF A COPYRIGHT CLEARINGHOUSE* 1 (1976) (providing proceedings of a conference on Feb. 11–12, 1976, sponsored by the Association of American Publishers and the Information Industry Association).

about document delivery services and photocopy machines, and about how their intellectual property and the rights they held could be jeopardized as a result of the latest technology. Congress recommended that publishers, authors and content users develop what became Copyright Clearance Center.<sup>2</sup>

CCC is a collective licensing organization—sometimes referred to as a Collective Management Organization or a “CMO”—that is like other CMOs in various fields and various countries, but is also unlike other CMOs. This Paper will tend to focus on those features that make it different. Nevertheless, CCC’s prime business objective, like that of most other CMOs, is to make copyright work efficiently for content creators, publishers and users.

## II. TEXT CONTENT VARIES WIDELY IN SIGNIFICANCE AND VALUE

Unlike CMOs focused on entertainment, CCC’s focus is information. All CMOs are in the copyright industry, but there are differences. For example, while sampling has become an important copyright issue in recent years in the music field, sampling in the information field has been commonplace for 150 years or more. Bits and pieces, headlines, articles, pages, chapters and the like are the stuff of interest, which are sometimes combined and sometimes disaggregated, sometimes copied and sometimes repurposed. And unlike the relatively concentrated number of major rights holders in the music industry, the number of rights holders—even only “major” rights holders—in the text field is incredibly vast, and users’ “sampling” of their works crosses genres, languages, eras, rights holders and even types of rights holders. A CMO addressing these issues needs access to data and metadata across all these dimensions to make its systems work.

In that environment, collective licensing models must be flexible—one size does not fit all. There are many factors driving this necessity, including diversity of content suppliers, differential valuation of content and variations in the needs and demands of individual rights holders.

First, it is easy to say that CCC’s rights holders all fall generally into the definition of creators and publishers of text works. However, popular newspaper and newsletter articles, erudite scholarly journal articles, fiction and nonfiction books, trade magazine articles, blog postings and other formats serve different purposes, have different business models and address different markets.

Second, the rights holders—and more importantly, the users—of these different types of content place vastly different values on them. It may be unfair that radio has reduced most musical compositions to undifferentiated “cuts” to be broadcast one after another, but no such circumstance affects text. How does one compare the value of a single news article with that of a single scholarly article, or the value of a book of acknowledged long-term significance with that of a quick opinion piece about a current event? And how does one do so when there are distinct markets that will not agree on those values in any event? For example, regardless of society’s “general view,” a bank may well place more value on today’s

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2. See, e.g., S. REP. NO. 94-473, at 71 (1975).

extremely brief news story than on a timeless piece of fiction of any length.

Finally, to make it possible for market participants to buy these rights on a one-off basis, licensing systems need to accommodate multiple prices and pricing models, and possibly multiple sets of terms. A CMO, however, must also offer repertory or blanket licenses. Consequently, CMOs must develop and maintain royalty models to accommodate all of these different issues, and do so with ongoing right holder input.

### III. RIGHTS DETAILS ARE COMPLICATED

The above description gives a general sense of the practical difficulties of implementing collective management, but the nitty-gritty details can help bring them home. For example:

- Who holds the rights to a specific work? And does that right holder hold the “right” rights for the transaction in question? Further, does the present right holder actually hold the rights to all past issues and volumes? (A hint: often not. At CCC, staff members refer to “bi-active” and “multi-active” rights—terms of CCC’s own creation—to reflect these situations in connection with individual works, and these distinct rights in single works may need to be managed separately.)
- Is there a single right holder or are there multiple rights holders for a single chapter or multiple chapters within a book? (A hint, particularly when it comes to nonfiction material: usually not, and sometimes CCC needs to track down an additional right holder when the one in publicly available records says it holds rights “but not those rights.”)
- Does the periodical publisher that holds the rights to its publication, and even to the articles it has published, also hold the rights to the photographs, charts and illustrations that appear within those articles? (A hint: as lawyers say, it depends. For example, it may depend on whether the embedded material is to be used separately or not.)
- How does one sort out royalty payments for a 2011 use of a work—say, an article in a 1983 issue of a journal—when the rights to that work were transferred from one right holder to another in 1997?
- How does a CMO deal with out-of-print or orphan works in a country like the United States, where there is no statutory structure for addressing them? That is, how do you deal with rights holders when you can’t find them? In some cases, rights may have reverted to the author, yet the author may have moved several times and any contact information may be useless. In other cases, rights to an out-of-print work may belong to both the author and the publisher, depending upon the use in question; that opens up a whole set of challenges around royalty allocation and disbursement, among other things.
- And of course, there is the diversity of licensing approaches from right holder to right holder. For example, in the science publishing field alone, some major publishers license book content at the chapter and text extract

levels and are also prepared to license individual images and other embedded content, while others will offer licenses solely at the page level.

These examples illustrate how much work around identifying rights and rights holders can be required by a single license transaction, and highlight some of the practical realities that CCC deals with all the time.

#### IV. LICENSE DETAILS ARE COMPLICATED

Certainly in the text field, and perhaps in others, CMOs need to offer a variety of licensing options to meet market needs. For example, CCC offers a menu of licensing options with centralized and decentralized models and both repertory and pay-per-use systems. CMOs must create licenses and licensing structures with at least the following things in mind:

- Uses, particularly digital uses, are no longer limited by territory (if they ever were). Global use, such as that undertaken by an integrated multinational company, requires global licensing. The European Commission is wrestling with cross-border or pan-European issues now and has announced its intention to regulate music licensing on a uniform basis across the twenty-seven countries of the European Union.<sup>3</sup> Other forms of licensing, perhaps including licensing of text, are likely close behind.
- Although uses are not limited by territory, copyright rights very often are, and so it is the task of the CMO to collect the necessary rights to ensure that it can issue a global license.
- Customer feedback is critical because market behavior changes. In CCC's case, when customers said they needed rights to share content electronically, CCC staff worked with rights holders to incorporate digital rights into preexisting licenses for photocopy uses. When customers asked CCC to extend rights to employees outside of the United States, CCC staff worked with rights holders to start cross-border licensing. And in 2010, CCC introduced its European subsidiary RightsDirect to provide companies headquartered outside the United States with similar licensing solutions.
- Most users do not have a thorough understanding of copyright, or of their obligations. And they do not have the time to learn whether or how to seek authorization, particularly in high-pressure for-profit situations. As a result, CMOs need to both build significant copyright education capabilities and create technology solutions that bring licensing into the user's workflow—making it apparent that a license must be considered and, if needed, efficient to obtain.
- Licensing must be efficient. In response to market demand addressed to

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3. See EUROPEAN COMM'N, FRAMEWORK DIRECTIVE ON COLLECTIVE RIGHTS MGMT. FOR USE OF MUSIC ONLINE (2010), *available at* [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2010\\_markt\\_019\\_collective\\_rights\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2010_markt_019_collective_rights_en.pdf).

the entire text content industry, CCC worked with several large publishing houses to develop and implement a licensing tool for use in the context of a user's workflow, enabling rights holders to tag their digital content and enable easy and efficient licensing right at the point of content (on the right holder's website). CCC first released its Rightslink<sup>®</sup> licensing service in 2000 and has been expanding and improving it ever since. It works on any digital content—photographs, videos, e-books, articles—and rights holders such as *The New York Times*, for example, apply it to material on their public websites, while other rights holders, such as *The Wall Street Journal* and science, technical and medical ("STM") publishers apply it to content that resides behind a firewall.

## V. LICENSE MANAGEMENT IS COMPLICATED

In order to facilitate all of these various kinds of licensing, a CMO needs a tremendous amount of high quality bibliographic metadata in addition to robust technology.

- Accurate bibliographic metadata is critical in order to express rights accurately, and cannot be overcome with technology alone. For example, as part of the proposed Google Books Settlement, Google opened a "registration" portal for a planned Book Rights Registry to enable rights holders to claim their works.<sup>4</sup> Rights holders who work with CCC reported finding no records in Google's database even for famous works, as well as records that did not reflect the works they had published. More than one reported that they were even finding records for infringing translations of their works in other countries, thus "works" of which they had never heard before. Compiling accurate bibliographic metadata is a huge effort for any CMO, and even expected sources for that metadata, such as national libraries, often do not have the necessary data and metadata.
- User demand for licensing is often not limited to formally published materials like books and journals. Users seek to license ephemeral material (posters, manuscripts and the like) as well, and the taxonomies for bibliographic data, let alone the metadata, for these kinds of works are often simply unavailable.
- Of course, user demand is not limited to text itself, even in the text publishing field. Photographs, video material, illustrations, charts and the

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4. See *Authors Guild v. Google Inc.*, 93 U.S.P.Q.2d 1159 (S.D.N.Y. 2009). The complaint was filed in 2005. Class Action Complaint, *Authors Guild*, 93 U.S.P.Q.2d 1159 (No. 05 CV 8136 (DC)), 2005 WL 2463899. The original Settlement Agreement was filed in 2008, Declaration of Michael J. Boni in Support of Plaintiffs' Motion for Preliminary Settlement Approval, *Authors Guild*, 93 U.S.P.Q.2d 1159 (No. 05 CV 8136 (DC)), and the Amended Settlement Agreement was filed in 2009, Amended Settlement Agreement, *Authors Guild*, 93 U.S.P.Q.2d 1159 (No. 05 CV 8136 (DC)). A fairness hearing was held in February 2010 and, as of this writing, Judge Chin (since appointed to the Court of Appeals for the Second Circuit, but retaining jurisdiction over this case as a trial judge) has not yet issued his decision on the parties' joint motion to approve the Amended Settlement Agreement. The Book Rights Registry is the subject of Article VI of the Amended Settlement Agreement. Amended Settlement Agreement, *Authors Guild*, 93 U.S.P.Q.2d 1159 (No. 05 CV 8136 (DC)).

like are all relevant, both for use in the context of the surrounding text and for use alone. Metadata, let alone bibliographic data, is frequently entirely absent in these cases.

- And technology is necessary, but never sufficient, for the work of a CMO. Application of brute technical force—for example, through high-power, high-speed technology—provides little value unless the many other, more human-level problems are addressed and resolved first. Further, there are challenges that technology cannot (at least not yet) begin to address. For example, uses evolve, and trying to itemize every use now (in order to store it in the technology) does a disservice to rights holders and users in the future who will want to benefit from unanticipated ways in which copyrighted content can be used. And, for the lawyers in the room, a pertinent—maybe an impertinent—question: can technology conduct a fair use analysis?

## VI. THE INTERNATIONAL COPYRIGHT ENVIRONMENT IS COMPLICATED

Establishing a CMO is challenging. There are 229 music CMOs in 121 countries.<sup>5</sup> But there are only some sixty CMOs focused on text and visual material, and probably only half of those are conducting even a modest amount of licensing business.<sup>6</sup> It is important to grow that number in order to expand copyright compliance, and it is important to support CMOs in emerging markets for many reasons.

- CCC's licensing model is based on the legal and economic circumstances extant in the United States. What that has meant is that CCC conducts all of these various forms of licensing described above on an entirely voluntary basis—what is known as an “opt-in” basis. This applies not only to rights holders—who can choose to participate or not in any or all of CCC's licensing services; it also applies to users because there is no statutory structure, beyond ordinary copyright law, which obliges users to pay license fees. In other countries, either rights holders or users—or both—are obliged to participate in at least some of the text CMOs' licensing services.
- CCC supports the creation and development of text CMOs around the world. Furthermore, CCC cares about the licensing models they choose—even as they negotiate with their local governments in this regard. CCC prefers that national systems be based on licenses to copyright rights held by rights holders, rather than on statutory structures (“legal licenses”) and extensions created by law or negotiated solely at the group level, because the exclusive-rights, voluntary-based model offers the market choice, both on the right holder side and the user side. In other words, CCC encourages

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5. See *CISAC and Authors' Rights*, INT'L CONFEDERATION SOC'YS AUTHORS & COMPOSERS, <http://www.cisac.org/CisacPortal/afficherArticles.do?numRubrique=4> (last visited Feb. 22, 2011) (known as CISAC for its French language acronym).

6. See *RRO Members*, INT'L FED'N REPROD. RIGHTS ORGS. (IFRRO), <http://www.ifro.org/RRO> (last visited Feb. 22, 2011).

models that allow known rights holders to opt in whenever possible, rather than having their rights automatically included under a legal license regime. Of course, this is not always possible if the rights holders are deceased or unidentified—and CCC understands the potential need for developing orphan works legislation to serve the market—but these circumstances should be the exception and not the rule.

- Market-based licensing benefits users as well because, for example, in countries using legal licenses, a license created by statute can necessarily create rights in that territory only and the CMOs, who are granted the rights by law, have nothing to offer the user who needs rights to share materials across borders. This makes it difficult for organizations with campuses or subsidiaries outside the country to comply with copyright on a uniform basis across all students or employees. This makes compliance more complex for the organization as a whole, and makes copyright education of constituents virtually impossible.
- The collective licensing foundation that has been established for voluntary licensing, with its sophisticated appreciation of rights, works and rights management, can also be used to address some of the challenges involving orphan works. For example, if any national government addresses orphan works with legislation allowing users to make legal use of these materials, the local CMO can facilitate necessary functions, ranging from a diligent search for rights and rights holders to metadata and license management or other requirements. This has already begun. In connection with licensing transactions for out-of-print works in Europe, the European Commission is funding a project called “ARROW,” which is intended to create an electronic commerce structure for those works and is expected to be managed by local CMOs.<sup>7</sup>

## VII. CONCLUSION

CCC currently manages secondary rights for millions of information sources. CCC offers repertory and pay-per-use licenses on its own website, on individual rights holders’ websites and through workflow applications that customers use every day. CCC provides market efficiency because it aggregates rights from many rights holders, builds common licensing platforms wherever possible, and has designed common licensing language at least within the United States. CCC has made a good start on identifying and addressing the many, many practical difficulties described above.

CCC, and collective management organizations generally, have established a portfolio of licensing options that are based on compromise. Rights holders and users—and indeed even intermediaries themselves, like CCC and other CMOs—must all give a little to make copyright work; and when they do, it does. The constitutional mandate to the United States government to build and maintain a copyright system for the benefit of the public says nothing about how to do it;

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7. See *ARROW—Accessible Registries of Rights Information and Orphan Works*, EUROPEANA GROUP, <http://group.europeana.eu/web/guest/details-arrow/> (last visited Feb. 22, 2011).

CMOs are doing the work.

CMOs must consult with rights holders and users to explore evolving uses (such as, today, mobile uses and e-prints) and find a middle ground. This is the power of voluntary collective licensing. This is what CCC does. CCC's license services are contract-based. They constitute a multifaceted, completely voluntary, opt-in system. We make copyright work.

The practical difficulties of creating and maintaining a collective licensing organization—particularly a voluntary one—are many, and this Paper highlights a few for purposes of today's conference and discussion. To attack the challenges presented, technology alone is insufficient; user demand for licenses is insufficient; massive sets of metadata are insufficient; right holder consent is insufficient. It is a combination of these and many other attributes that create a functioning collective system.

The *benefit* of voluntary collective licensing is that it provides the foundation for market-driven solutions, and ultimately provides the most user-friendly, cost-effective way to serve rights holders and users.

The *promise* of voluntary collective licensing is that it can help address the challenges that the copyright world, and society generally, are grappling with now—such as orphan works and mass digitization—as it did in the past with mass copying, broadcasting and the like. It can also help address those challenges that will emerge in the future.